HON. THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ROBERT DOUCETTE; BERNADINE ROBERTS; SATURNINO JAVIER; TRESEA DOUCETTE, Plaintiffs, v. DAVID BERNHARDT, Acting Secretary for the United States Department of Interior, in his official capacity; TARA SWEENEY, Assistant Secretary—Indian Affairs, in her official capacity; JOHN TAHSUDA III, Principal Deputy Assistant Secretary—Indian Affairs, in his official capacity; UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	NO. 2-18-cv-0859-TSZ RULE 62.1 MOTION FOR INDICATIVE RULING ON PLAINTIFFS' RULE 60(b) AND 15(a)(2) MOTIONS NOTE ON MOTION CALENDAR February 21, 2020 **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION

Defendants omitted from the Administrative Record ("AR") four email exchanges that reveal how and why Principal Deputy Assistant Secretary ("PDAS") John Tahsuda came to recognize the new Nooksack Tribal Council on March 9, 2018. According to those emails—which were sent up until March 8, 2018, between the U.S. Department of the Interior's ("DOI" or "Interior") brand new Nooksack special election point-person and the holdover Council's

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Washington, D.C. private lobbyist—PDAS Tahsuda's decision "occur[ed] by then" so "that a federal court could [not] find duly elected Tribal officials liable for RICO claims."

PDAS Tahsuda hurriedly issued the decision by March 9, 2018, at 2:05 p.m. ET because up until that moment, a "lack of DOI recognition" could have "mean[t] that the Tribe's officials [we]re acting ultra vires, and thus operating a 'racket' under RICO" according to the Ninth Circuit Court of Appeals in a pending appeal in *Rabang v. Kelly*, No. 17-35427 (9th Cir.). DOI also entertained some form of "Nooksack Draft Resolution/Proposal" from the holdover Council prior to the decision, the proof of which Defendants also omitted from the AR.

As it turns out, PDAS Tahsuda's decision was not intended to fulfill the Federal Government's statutory responsibility to recognize a legitimate Nooksack tribal government. In a twist befitting of only the Trump Administration, the four withheld email exchanges indicate that both the Bureau of Indian Affairs ("BIA") Regional Director's, March 7, 2018, Endorsement Memorandum and PDAS Tahsuda's March 9, 2018, recognition decision were rendered in haste at the lobbyist's urging—to aid the holdover Councilpersons in their personal capacities as defendant-appellants in a federal civil RICO appeal hearing before the Ninth Circuit on the very same day of his decision: March 9, 2018.

Defendants sought to advantage racketeers who, indisputably, overthrew and misused the Nooksack government for the two years preceding PDAS Tahsuda's decision.[1]

In light of this newly discovered withheld evidence, Plaintiffs respectfully request that the Court indicate to the Ninth Circuit that it would grant Plaintiffs' Rule 60(b) and 15(a)(2) Motions.

[1] *Nooksack Indian Tribe v. Zinke,* No. 2:18-cv-00859TSZ (W.D. Wash.), Dkt. # 43 at 1-6; *Rabang v. Kelly*, No. 2:17-cv-00088-JCC (W.D. Wash.), Dkt. # 62 at 2-6. During appellate oral argument in *Rabang* on March 9, 2018, Ninth Circuit Court of Appeals Senior Judge Richard B. Clifton called the holdover Council's "record" during those two years one that a "tin-pot dictator of a banana republic might be proud of." *Rabang v. Kelly*, No. 17-35427 (9th Cir. Mar. 9, 2018), Dkt. # 32, at 0:55. Nobody should think that the holdover Councilpersons would deviate from their despotic scheme when it came to the December 2, 2017, special election.

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Had Defendant filed the "whole record" as required by federal law, and when required by this Court nearly a year ago, Plaintiffs would have sought leave to bring two additional Administrative Procedure Act ("APA") claims, *i.e.*, that PDAS Tahsuda's March 9, 2018, decision (1) is *per se* arbitrary and capricious; and (2) resulted from improper political influence and for reasons that Congress did not intend him to consider. Dkt. # 20 at 1; 5 U.S.C. § 706; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Plaintiffs have now presented new evidence that "raises a substantial issue," the relevance of which Plaintiffs and this Court should at least be allowed to explore. Fed. R. Civ. P. 62.1. Plaintiffs have otherwise "made [a] showing that defendants' actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' . . ." Dkt. #41 at 20. This Court should not countenance Defendants' now transparent dereliction of Interior's duties—especially its statutory and Court-ordered obligation to furnish this Court the whole record. 5 U.S.C. § 706.

II. FACTS

A. Defendants Arbitrarily And Capriciously Factored The Holdover Council's Potential Civil RICO Liability In *Rabang v. Kelly*, Into PDAS Tahsuda's Recognition Decision.

The events leading up to the December 2, 2017, Nooksack Tribal Council special election, and to PDAS Tahsuda's March 9, 2018, decision to recognize "the validity of the Tribal Council comprised [in pertinent part] of the four Tribal Council members elected . . . in the Special Election" ("Recognition Decision"), have been well documented by the U.S. District Court for the Western District of Washington in three companion cases: *Nooksack Indian Tribe v. Zinke,* No. 2:18-cv-00859TSZ (W.D. Wash.), Dkt. # 43 at 1-6; *Rabang v. Kelly*, No. 2:17-cv-00088-JCC (W.D. Wash.), Dkt. # 62 at 2-6; and this matter, Dkt. # 41 at 3-7.

On March 7, 2018, the BIA Acting Northwest Regional Director ("Regional Director") issued a Memorandum to PDAS Tahsuda, concluding that "the special election was conducted

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according to the Nooksack Constitution, Bylaws and Tribal Law Ordinances" ("Endorsement Memorandum"). Dkt. #23-12. As Plaintiffs alleged as the gravamen of their original Complaint, the Regional Director suddenly and inexplicably "decline[d] to interpret tribal law" regarding the pivotal issue in the special election: "whether ballots could be received by hand or whether all ballots had to be postmarked" in order to be counted. *Id.*, at 4; Dkt. # 1 at 23. No less than ten business hours later, PDAS Tahsuda issued the Recognition Decision. Dkt. # 26-5. What Plaintiffs did not know, and could not have known until now, is that *Rabang v. Kelly* ("*Rabang*"), a civil Racketeer Influenced and Corrupt Organizations Act ("RICO") action brought by other Nooksack Indians against the holdover Councilpersons[2] in their personal capacities, was a predominate—and arbitrary—factor at DOI in the hours leading up to the Recognition Decision.[3] Dkt. # 21 at 2; Second Declaration of Gabriel S. Galanda ("Galanda Decl."), Exs. A-D.

On April 26, 2017, U.S. District Court Judge John C. Coughenour denied the *Rabang* defendants' motion to dismiss, but noted: "if the DOI and BIA recognize tribal leadership after new elections, this Court will no longer have jurisdiction and the issues will be resolved internally." Dkt. #62 at 11. The *Rabang* defendants appealed to the Ninth Circuit on May 17, 2017, which heard oral argument on March 9, 2018. *Rabang v. Kelly*, Dkt. # 69. Plaintiffs now appreciate why PDAS Tahsuda's brand new advisor, Kyle Scherer, presented the Recognition Decision to DOI's Office of the Executive Secretariat for immediate "approval" that same day, before issuing the decision on PDAS Tahsuda's behalf less than three hours later. Dkt. #26-5. Galanda Decl., Ex. D. Four email exchanges omitted from the AR demonstrate that Mr. Scherer

[2] The term "holdover Council," as used by this Court, refers to the Nooksack Tribal Council between March 24, 2016 and March 9, 2018, during which time several Councilpersons refused to vacate their expired seats. Dkt. # 43 at 2-3.

[3] Nor did Defendants' local counsel appreciate the relevance of *Rabang* or, apparently, know that Defendants omitted or withheld any information from the AR. *See* Dkt. # 21 at 2. While Plaintiffs question the motives and behavior of the Trump Administration's DOI, Plaintiffs do not impute Defendants' nonfeasance or malfeasance to U.S. Attorney Brian Moran or Assistant U.S. Attorney Brian Kipnis, both who Plaintiffs' counsel hold in the highest ethical regard.

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did so at the urging of Robert Porter, the holdover Council's Washington, D.C. private lobbyist, in hopes that the Ninth Circuit would not "find" that the holdover Council could be civilly "liable for RICO claims" or that "the Tribe's officials are acting ultra vires, and thus operating a 'racket' under RICO," vis-à-vis "Tribal sovereign immunity defense."[4] Galanda Decl., Exs. A, B. Those withheld emails are hereinafter referred to as the "Scherer-Porter Emails."

B. The Omitted Scherer-Porter Emails Reveal DOI's Scheme To Help Holdover Councilpersons Avoid Civil Liability For "Operating A 'Racket' Under RICO."

Mr. Scherer joined DOI in December of 2017. Galanda Decl., Ex. F. At that time and until January of 2018, Miles Janssen was the Assistant Secretary – Indian Affairs ("ASIA")'s point person for the Nooksack special election; he had counseled PDAS Lawrence Roberts regarding Nooksack in 2016, as well as Acting ASIA Mike Black in 2017, and PDAS John Tahsuda through December of 2017. *See* Dkt. # 26-6 (Janssen invited to attend "Rob Porter/Nooksack Meeting" with Acting ASIA Black on June 15, 2017); Dkt. # 23-6 (Janssen furnishes "the briefing for John's upcoming meeting at Nooksack," on December 8, 2017); *Id.* (Janssen reporting the BIA's "num[erous] concerns with the election process" to PDAS Tahsuda); Galanda Decl., Ex. O (Janssen asked to "include anyone from [ASIA] . . . appropriate for a call" with the BIA on January 18, 2018). Mr. Janssen had at least two years of institutional knowledge about Nooksack, spanning both the Obama and Trump Administrations. *Id.*

By January 3, 2018, Mr. Scherer began to lead ASIA's deliberations regarding the "MOA and 'where [to go] from here . . .'" *Id.*, Ex O at 1. On January 18, 2018, Mr. Scherer called the Regional Director's office and "asked about status of ballot review and requested a copy of the

[4] Messrs. Scherer and Porter's plan worked. With the Recognition Decision in hand, the *Rabang* holdover Council-RICO defendants voluntarily dismissed their Ninth Circuit Appeal. *Rabang v. Kelly*, No. 17-35427 (9th Cir. Mar. 9, 2018), Dkt. # 39. Upon remand, Judge Coughenour reversed course by granting dismissal in their favor because: "Pursuant to the MOA and the DOI's recent recognition decision, the DOI's past decisions no longer provide a basis for this Court to exercise jurisdiction." *Id.*, Dkt. ## 166 at 7; 167. With *Rabang* now back before the Ninth Circuit and tethered to this case, Plaintiffs will notice this Motion to both the *Rabang* and *Doucette* panels. *Id.*, Dkt. # 41.

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galanda letter[5]; said he wanted to avoid us being in the next election." *Id.*, Ex. R; *see also id.*, Ex. S (PDAS Tahsuda: "Kyle had been overseeing it as well. This is part of the disputed elections.").

By February 2, 2018, Mr. Scherer lead a "Nooksack Discussion" between ASIA and the BIA, the agenda for which provides: "Nooksack Draft Resolution/Proposal (Kyle will explain) . . . Draft AS-IA Memo" (which became the Regional Director's March 7, 2019, Endorsement Memorandum[6]). *Id*. at 6. At that time, the Tribal Council indisputably lacked quorum to pass any "Resolution" or proffer any "Proposal" to ASIA that deviated from the process set forth in the August 25, 2017, Memorandum of Agreement ("MOA"). Dkt. # 41 at 4-6. There is nothing in the AR regarding any "Nooksack Draft Resolution/Proposal." Dkt. ## 23, 26.

On February 5, 2018, DOI identified Mr. Scherer as the new Nooksack point person in ASIA's "front office." *Id*., Ex. G. Mr. Janssen, although still involved, was no longer ASIA's lead counselor. *See id.,* Exs. G, R. Mr. Scherer was calling the shots. *Id.*

Ten days later, Mr. Porter emailed Mr. Scherer:

> I just heard from the Nooksack Tribal attorney that the 9th circuit has scheduled an oral argument in the RICO case against the Nooksack elected officials. The record as you know does not reflect that the DOI recognizes a Nooksack Gov't. **Were the DOI certification not occur by then, there is great risk that a federal court could** if it's a Tribal sovereign immunity defense and **find duly elected Tribal officials liable for RICO claims for the first time.**
>
> **I believe you need to urge the Refional** [sic] **Director to complete his recommendation as soon as possible.** It's been three weeks since the site visit and it seems really hard to believe - given his original letter - that there is any basis for not certifying to the AASIA.

[5] Dkt. #23-9 or Dkt. #23-10.

[6] Defendants suggest the Regional Director issued the Endorsement Memorandum independent of ASIA. *See* Dkt. #34 at 13 ("the Acting Regional Director concluded based on her review of the evidence that the election was conducted in a sufficiently fair manner for her to provider her endorsement, and no [sic] resort to an interpretation of the Tribe's Election Code was necessary to reach that conclusion."). However, ASIA steered the draft Endorsement Memorandum and by all indications, caused the Regional Director to demur on ballot validation. Galanda Decl., ¶6; Exs. V, R ("Revisions to memo will come back early next week."). If ASIA was supposed command the BIA—it wasn't—there would have been no need for the endorsement process in the MOA's Paragraph D. Dkt. #25 at 2.

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Galanda Decl., Ex. A (emphasis added). Mr. Porter's email suggests he had previously been in communication with Mr. Scherer—at least in regard to Nooksack's "Draft Resolution/Proposal" circa February 2, 2018—but the AR is also void of any such communication. *See id.*; Dkt. # 23-1.

On February 28, 2018, Mr. Porter again emailed Mr. Scherer:

> I wanted to touch base regarding the DOI recognition of the Nooksack Council. I understand that the process is proceeding, but I have been contacted by Counsel for the Tribe regarding the timing. **As I mentioned previously, there is a March 9th hearing before the 9th Circuit Court of Appeals and there is the need to prepare if the AASIA recognition letter is still pending by next week. (Recall that this case is RICO action brought by plaintiffs arguing that the lack of DOI recognition means that the Tribe's officials are acting ultra vires, and thus operating a "racket" under RICO.**)
>
> **In short, the AASIA's recognition letter is needed asap, certainly by early next week.**

Id., Ex. B (emphasis added).

Five business days later, on March 7, 2019 at 1:34 p.m. ET, the Regional Director issued her Endorsement Memorandum to PDAS Tahsuda. Dkt. #23-12; Galanda Decl., Ex. T.

By the very next morning, March 8, 2018, at 9:45 a.m. ET, Mr. Porter was already aware that DOI was prepared to issue the Recognition Decision. *Id.*, Ex. C. In an email to Mr. Scherer titled, "Letter delivery," Mr. Porter wrote: "Hi Kyle - I'm on a plane much of the day, so could you please copy the Tribal attorney Charles Hurt on the email with the letter when you send it? Thanks, Rob."

By the following morning, March 9, 2018, at 11:07 a.m. ET, Mr. Scherer had drafted and surnamed/approved the Recognition Decision, and presented it for PDAS Tahsuda's approval.[7]

[7] Unlike a March 16, 2018, letter from PDAS Tahsuda to the Nooksack Chairman, which was surnamed by six DOI officials in Washington, DC, PDAS Tahsuda's March 9, 2018, Recognition Decision was surnamed only by Mr. Scherer and one other official, Rebekah Krispinsky, an assistant solicitor in Albuquerque. *Compare* Dkt. #26-5, *with* Galanda Decl., Ex. U. Even the process used for issuance of the Recognition Decision was arbitrary and capricious.

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Dkt. #26-5. At 2:05 p.m. ET—while the Ninth Circuit deliberated in *Rabang*—Mr. Scherer emailed the Nooksack Chairman the Recognition Decision. Galanda Decl., Ex. D.

Mr. Scherer blind copied his email to Mr. Porter, who replied: "Thank you, Kyle." *Id.*

On April 3, 2018, Plaintiff's counsel spoke with Greg Norton, the BIA Northwest Region's Tribal Government Specialist and author of the Endorsement Memorandum; and Christina Parker, Attorney-Advisor of DOI's Office of the Regional Solicitor. Galanda Decl., Exs. I, V. Counsel asked them why the Regional Director demurred on the pivotal ballot validation issue of whether ballots could be received by hand or postmarked. Galanda Decl., ¶6. Ms. Parker answered: "We are just doing as we are told by DC." *Id.*; *see also id.*, Ex. P at 2 n.3. The Scherer-Porter Emails now afford context for this admission.[8]

C. ASIA Withheld The Scherer-Porter Emails Despite Plaintiffs' FOIA Request.

On May 16, 2018, Plaintiffs' counsel submitted a Freedom of Information Act ("FOIA") request to ASIA for: "Any email or written communication transmitted to or received by the U.S. Department of Interior's Office of the Assistant Secretary for Indian Affairs . . . regarding the Nooksack Special Election that culminated in December 2017 . . . ." Galanda Decl., Ex. I. Although the Scherer-Porter Emails are certainly responsive, DOI failed to produce any of those email communications through its July 10, 2018, FOIA response. *Id.*, Ex. J; *id.* ¶8. To the extent the "Nooksack Draft Resolution/Proposal" was emailed or transmitted to ASIA, DOI also failed to produce that or anything related information per FOIA on July 10, 2018. *Id.*

[8] Consistent with DOI's April 3, 2018, admission, Mr. Norton sought Mr. Scherer's input on a "couple of items" pertaining to Nooksack on March 26, 2018. *Id.*, Ex. M. In other words, after the Recognition Decision, Mr. Scherer continued to "oversee" and "explain" things for ASIA's front office. *Id.; see also id.*, Exs. G, O, R.

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D. Defendants' Omission Of The Scherer-Porter Emails And "Nooksack Draft Resolution/ Proposal" Prejudiced Plaintiffs' Case.

Plaintiffs filed their Complaint on June 13, 2018 and amended it on January 3, 2019. Dkt. ## 1, 18. Pursuant to Rule 11(b)(3), Plaintiffs brought one APA claim, alleging that "Interior suddenly, and without explanation, departed from its established policy and refused to interpret Tribal law to determine whether the special election was held in accordance with Tribal law and thus whether the Tribal Council is validly seated as the governing body of the Tribe." *Id*., at 23.

By February 22, 2019, this Court required that Defendants file the AR, which should have constituted the "whole record." Dkt. # 20 at 1; 5 U.S.C. § 706. DOI filed the initial AR under a Certification from Tyler Fish, the very latest Counselor to PDAS John Tahsuda, who "testif[ied] that, to the best of [his] knowledge" the documents filed with the Court that day "constitute[d] the complete Administrative Record on which [PDAS Tahsuda] . . . relied when issuing his March 9, 2018, letter." Dkt. # 23 at 2. Because the initial AR did not include relevant records that Plaintiffs' counsel either (a) *did* get from DOI per FOIA, or (b) transmitted to DOI in late 2017, Defendants stipulated to supplement, and then supplemented, the AR with seven documents. Dkt. # 24. Had Plaintiffs then known of either the Scherer-Porter emails or holdover Council's "Draft Resolution/Proposal," Plaintiffs would have demanded that DOI also file those documents in the AR,[9] as well as any other information that directly or indirectly gave rise to the Endorsement Memorandum or PDAS Tahsuda's Recognition Decision.[10] As discussed below, Plaintiffs would

[9] Because Plaintiffs were suspicious about Mr. Porter's involvement in a December 11, 2017, meeting with PDAS Tahsuda "[t]o discuss the results of the recent Nooksack tribal election and plans for moving forward" according to a FOIA record and surmising that Mr. Porter's absence from the AR was by his "clever design to minimize his on-record activity," Plaintiffs also demanded that DOI search for "any text messages received from or sent to Rob Porter by John Tahsuda or Kyle Scherer" from December 1, 2017 to March 9, 2018. Dkt. ## 12-11, 23-1; Galanda Decl., Exs. K, L. But that inquiry did still not reveal Mr. Porter's influence. In hindsight, that inquiry should have been unnecessary—because DOI should have produced the Scherer-Porter emails in the original AR.

[10] *Cf.* Galanda Decl., Exs. G, O.

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have also sought leave to further amend their Complaint per Rule 15(a)(2) and discovery of additional information in the face of Defendants' summary judgment motion per Rule 56(d).

E. In November Of 2019, ASIA Finally Produced Scherer-Porter Emails Under FOIA.

On September 23, 2019, Plaintiffs' counsel filed a second FOIA request with ASIA, seeking "any and all information pertaining to meetings or communications between Kyle Scherer and lobbyist Robert Porter, between December 1, 2017 and the present." Galanda Decl., Ex. E. Plaintiffs' counsel received ASIA's response, including the previously withheld Scherer-Porter email, on November 20, 2019. *Id*., ¶3.

F. In December Of 2019, ASIA Finally Produced Indication Of The "Nooksack Draft Resolution/ Proposal" Under FOIA.

On December 9, 2019, Plaintiffs' counsel filed a FOIA request with the BIA for "Gregory Norton's calendar . . . between December 1, 2017 and March 31, 2018," which netted additional information showing Mr. Scherer's sudden, pivotal role in the Endorsement Decision and Recognition Decision. *Id*., Exs. N, O. Mr. Norton's calendar also revealed evidence of the previously unknown "Nooksack Draft Resolution/Proposal." *Id*., Ex. O.

Plaintiffs left a message with Defendants' counsel on December 9, 2019, and emailed defense counsel on December 13, 2019, seeking to notify Defendants that Plaintiffs intended to bring this Motion. *Id*., ¶17. The parties conferred on January 3, 2020, and agreed that Plaintiffs would file this Motion by late January or early February of 2020. *Id.*

III. LAW AND ARGUMENT

The Ninth Circuit Court of Appeals explains that "[t]he whole administrative record," as per 5 U.S.C. § 706, "'is not necessarily those documents that the *agency* has complied and submitted as 'the' administrative record.' 'The 'whole' administrative record . . . consists of all documents and materials directly or *indirectly* considered by agency decision-makers and

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includes evidence contrary to the agency's position.'" *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis in original; citations omitted). The newly discovered Scherer-Porter emails reveal, at minimum, that DOI—specifically PDAS Tahsuda by way of Mr. Scherer[11]—directly or indirectly considered the March 9, 2018, *Rabang* appellate hearing when deciding to issue the Recognition Decision on that same day. The whole AR must now be brought before this Court.

A. FED. R. CIV. P. 62.1 ALLOWS THIS COURT TO REMEDY DEFENDANTS' MALFEASANCE.

"A party proffering newly discovered evidence may obtain an indicative ruling from a district court concerning relief from judgment pending appeal." *Franken v. Mukamal*, 449 F. App'x 776, 779 (11th Cir. 2011) (citing Fed. R. Civ. P. 62.1; Fed. R. App. P. 12.1); *see also Amarin Pharm. Ireland v. Food & Drug Admin.*, 139 F. Supp. 3d 437, 447 (D.D.C. 2015) ("Where a district court concludes, for example, that newly discovered evidence warrants vacatur of a judgment that is already on appeal, the court can issue an indicative ruling . . . .").

Once an appeal is filed, the District Court no longer has jurisdiction to consider motions to vacate judgment. *Gould v. Mut. Life Ins. Co. of N.Y.*, 790 F.2d 769, 772 (9th Cir.1986). However, the District Court may entertain and decide a motion after notice of appeal is filed if the movant adheres to Rule 62.1, which sets forth a process to "ask the district court whether it wishes to entertain the motion, or to grant it, and then move this court, if appropriate, for remand of the case." *Id; see also Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976) ("The most the District Court could do was to either indicate that it would 'entertain' such a motion or

[11] Indirect consideration, as per the Ninth Circuit in *Thompson*, reflects "the reality that agency heads act through subordinates and subordinate decisionmakers prior to the agency head making a final decision." Leland E. Beck, Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking, Administrative Conference of the United States (May 14, 2013), at 69 (citing Thompson, 885 F.2d at 555), https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf (last visited Dec. 22, 2019).

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indicate that it would grant such a motion."). If the District Court states that it would grant the motion or that the motion raises a "substantial issue," the movant must notify the Circuit Clerk and the District Court "may decide the motion if the court of appeals remands for that purpose." Fed. R. Civ. P. 62.1(b), (c); *see also Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, No. 16-04294, 2018 WL 2010980, at *4 (N.D. Cal. Apr. 30, 2018) (district courts "have authority to deny [a motion], but . . . may not grant it without a remand from the court of appeals").

1. Fed. R. Civ. P. 60(b) Relief From This Court's Judgment is Appropriate.

Usually, Rule 62.1 relief is sought under Rule 60(b). *See Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004) ("To seek Rule 60(b) relief during the pendency of an appeal, the proper procedure is to ask the district court whether it wishes to entertain the motion, or to grant it, and then move this court, if appropriate, for remand of the case."). As explained in *Hake v. Guardian Life Ins. Co.*:

> Rule 62.1 permits the Court to make an "indicative ruling" on a post-judgment motion to give the Court of Appeals an indication on how the Court would rule if it still had jurisdiction to rule. The Rule 62.1 "indicative ruling" procedure was instituted to deal with post-appeal Rule 60(b) motions, where a district court lacks jurisdiction to rule directly.

No. 07-1712, 2010 WL 11578944, at *2 (D. Nev. Apr. 1, 2010) (citing Fed. R. Civ. P. 62.1 advisory committee's note). In *Comm. on Oversight & Gov't Reform, United States House of Representatives v. Sessions* it was similarly explained:

> Rule 62.1 provides that upon the timely filing of a motion for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue. This rule is invoked in situations where a court has lost jurisdiction over a case because it has been docketed for appeal, and therefore cannot entertain motions such as those made under Rule 60(b) for relief from judgment. Rule 62.1 allows a court to indicate to the appeals court that it would grant the party's motion if remanded to the lower court.

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344 F. Supp. 3d 1, 7 (D.D.C. 2018) (quotation omitted).

2. Fed. R. Civ. P. 15(a)(2) Leave To Amend Is Also Appropriate.

While "Rule 62.1 codifies the procedure most courts used to address Rule 60(b) motions to vacate final judgments which had already been appealed . . . , nothing in Rule 62.1's language limits its application to Rule 60(b) motions or to motions made after final judgment." *Ret. Bd. of Policemen's Annuity v. Bank of New York Mellon*, 297 F.R.D. 218, 221 (S.D.N.Y. 2013). The Advisory Committee's note confirms that it "adopt[ed] for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal." Fed. R. Civ. P. 62.1 Advisory Committee's Note; *see also Idaho Bldg. & Const. Trades Council, AFL-CIO v. Wasden*, No. 11-0253, 2013 WL 1867067, at *3 (D. Idaho May 1, 2013) (issuing an indicative ruling under Rule 62.1 regarding a motion to add a party under Rule 21); *Reflex Media, Inc. v. Chan*, No. 16-0795, 2017 WL 8223985, at *1 (C.D. Cal. Oct. 17, 2017) ("Rule 62.1 provisions were originally drafted as an addition to Rule 60, addressing only relief under Rule 60 pending appeal, but the proposal was broadened to include all circumstances in which a pending appeal ousts district-court authority to grant relief.").

Thus, an indicative ruling is appropriate where, under any Rule of Federal Procedure, it would "allow for the timely resolution of motions which may further the appeal or obviate its necessity" and not simply "place a district court in a position where it must predict the outcome of an appeal of its own decision." *United States v. Brennan*, 385 F. Supp. 3d 205, 208 (W.D.N.Y. 2019) (quotation omitted); *see e.g. Rabang v. Kelly*, No. 17-088, 2018 WL 1737944, at *3 (W.D. Wash. Apr. 11, 2018) (denying a Rule 62.1 motion that was "simply asking this Court to decide the question on appeal").

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As made clear in the ensuing provisions, Plaintiffs' Rule 62.1 motion has nothing to do with the question on appeal, *i.e.*, whether DOI established, and eventually deviated, from a policy of interpreting Tribal law in regard the special election. To the contrary, Plaintiffs are requesting that this Court allow Plaintiffs to assert two new claims, based on new evidence that was not—but should have been—available when Defendants filed their summary judgment motion. The question on appeal, in other words, is separate and distinct from what this new evidence has revealed and the new claims that evidence supports as per Rule 11(b)(3). Were the Court to grant Plaintiffs' motion and issue the requested indicative relief, the ruling previously appealed would be akin to a partial grant of summary judgment on Plaintiffs' policy claim, which Plaintiffs could appeal once a final judgment were issued, but would no longer need to be decided at this juncture.

C. PLAINTIFFS DESERVE BOTH FED. R. CIV. P. 60(B) AND 15(A)(2) RELIEF.

1. Plaintiffs Deserve Leave To Plead Two New APA Claims By Amendment.

A motion to amend the complaint "can be entertained if the judgment is first reopened under a motion brought under Rule 59 or 60." *Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996); *see also Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (same). Under Rule 60(b)(6), a judgment may be vacated for any "reason justifying relief from operation of the judgment." Fed. R. Civ. P. 60(b)(6). The U.S. Supreme Court has held that a "motion to vacate the judgment in order to allow amendment of the complaint" constitutes such a justifying reason, so long as the movant meets the requirements of Rule 15(a). *Foman v. Davis*, 371 U.S. 178, 182 (1962). As the *Foman* rule was more recently articulated by the Fourth Circuit:

> To determine whether vacatur is warranted . . . the court need not concern itself with either [Rule 59 or 60]'s legal standards. The court need only ask whether the amendment should be granted, just as it would on a prejudgment motion to amend pursuant to Fed. R. Civ. P. 15(a). In other words, a court should evaluate a postjudgment motion to amend the complaint under the same legal standard as a

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> similar motion filed before judgment was entered—for prejudice, bad faith, or futility.

Katyle v. Penn Nat. Gaming, Inc., 637 F.3d 462, 471 (4th Cir. 2011) (quotation omitted).[12]

Had DOI produced the whole record—including the Scherer-Porter Emails— per 5 U.S.C. § 706, when it originally filed the AR, Plaintiffs would have had the factual and legal basis required by Rule 11(b)(3) to seek leave to amend their Complaint and add two new APA claims. Galanda Decl., Exs. A-D; Dkt. # 20 at 1. Plaintiffs would have alleged that PDAS Tahsuda's Recognition Decision is (1) *per se* arbitrary and capricious, and (2) was issued as a result of improper political influence and for reasons that Congress did not intend him to consider. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Plaintiffs now have the evidence they need to bring those two claims. Plaintiffs were manifestly prejudiced by not being able to seek leave to plead those two new claims to the Court under Rule 15(a). Neither new claim would be futile, as discussed below. Both claims are plausible, if not dispositive in favor of Plaintiffs. Defendants, on the other hand, have demonstrated bad faith by not originally producing the Scherer-Porter emails either as part of the AR on February 22, 2019, or in response to Plaintiffs' counsel's May 16, 2018, FOIA request for such emails. Galanda Decl., Ex. I.

2. Plaintiffs Should Also Be Granted Rule 60(b)(2) Relief.

Rule 15(a) aside, Plaintiffs are independently entitled to Rule 60(b)(2) relief under the "newly discovered evidence" rule. Fed. R. Civ. P. 60(b)(2). For the Court to grant relief under this rule "the movant must show the evidence (1) existed at the time of the [judgment], (2) could not have been discovered through due diligence, and (3) was of such magnitude that production of

[12] This rule only applies where, as here, relief is sought under Rule 59 or 60 *and* Rule 15 *at the same time*. *Bolden v. McCabe, Weisberg & Conway*, No. 13-1265, 2014 WL 994066, at *1 n.2 (D. Md. Mar. 13, 2014), *aff'd*, 584 F. App'x 68 (4th Cir. 2014) (citing *Calvary Christian Ctr. v. City of Fredericksburg, Va.*, 710 F.3d 536, 540 (4th Cir. 2013)).

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it earlier would have been likely to change the disposition of the case." *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (quotation omitted).

Requirements (1) and (2) are easily met. There is no doubt that this evidence was discovered after the now-appealed judgment was issued. Plaintiffs' counsel discovered the Scherer-Porter Emails on November 20, 2019, only after submitting a September 23, 2019, FOIA request to ASIA for such emails. Galanda Decl., Exs. A-D. Plaintiffs learned of the "Nooksack Draft Resolution/Proposal" on December 18, 2019, only after submitting another FOIA request to the BIA after getting the Scherer-Porter Emails. *Id*., Exs. N-O. Plaintiffs otherwise exercised abundant due diligence in trying to ascertain why PDAS Tahsuda turned a blind eye to their particularized allegations of election fraud, *i.e.*, the absolute void of any postmarked or voter-signed outer envelopes,[13] since April of 2018:

- April 2, 2018: Plaintiffs' counsel "pointedly asked" Mr. Norton and his attorney "why the Regional Director demurred on the pivotal ballot validation issue of whether ballots could be received by hand or postmarked. Galanda Decl., ¶6.
- May 16, 2018: Plaintiffs' counsel sent ASIA a FOIA request that should have netted the Scherer-Porter Emails. *Id*., Exs. I, J.

[13] Plaintiffs may have had "unfettered access" to the ballot logs *since the AR was filed* on February 22, 2019, but that conclusion ignores the reality that the Saturday, December 2, 2017, special election record closed at 4:00 p.m. PT on Monday, December 4, 2017—meaning a seven business hours later—and it was that record that informed the Endorsement Memorandum. Dkt. ## 41 at 20; 23-13 at 7; 23-12-23-17. In other words, because Plaintiffs did not have *any* access to the ballot logs in the seven hours before the record closed, there was no way for them to develop any affidavit or other "evidence that any person assigned to a ballot that was counted did not in fact vote" in time to get that evidence into the AR now before this Court. Dkt. #41 at 20. Plaintiffs have since developed evidence that corroborates exactly what they foretold the BIA: "the Special Election ballot box was stuffed with illegal replacement ballots . . . . [I]llegal ballots . . . were completed an cast for voters who either had not voted themselves, who had unknown addresses, or whose election packets had been returned to sender." Galanda Decl., Ex. P at 10; *see also id*. at 9 (confirming that no ballots were validated by postmark or voter signature in the presence of BIA observers). The fact remains that there is not a scintilla of evidence that *any* special election ballots were validated by either postmark or voter signature. *See* Dkt. # 41 at 20. That fact would not stand in any federal or state election.

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- February 25, 2019: Plaintiffs demanded that DOI search for any text messages exchanged between Mr. Scherer and Mr. Porter from December 1, 2017 to March 9, 2018, sensing that Mr. Porter had cleverly "minimize[d] his on-record activity." *Id*., Exs. K, L.

- September 23, 2019: Plaintiffs' counsel sent a second FOIA request to ASIA for any "communications between Kyle Scherer and lobbyist Robert Porter" December 1, 2017, which they received on November 20, 2019. *Id*., ¶3; Ex. E.

- November 21, 2019: Plaintiffs sent a FOIA request to the BIA for pertinent "email communications, or records of telephone calls or teleconferences" involving "Kyle Scherer, Miles Janssen, or anybody else with the Department of the Interior Office of the Assistant Secretary—Indian Affairs" between December 1, 2017 and March 31, 2018," which the BIA fulfilled on January 13, 2020. Id., Ex. Q.

- December 9, 2019: Plaintiffs sent a second FOIA request to the BIA for Mr. Norton's calendar entries between December 1, 2017 and March 31, 2018, which they received from the BIA by January 10, 2020. *Id*., ¶13; Exs. N, O.

There is not much more Plaintiffs could have done to uncover the now-exposed Scherer-Porter Emails and, thus, what appears to be the real reason why PDAS Tahsuda received the Endorsement Memorandum on March 7, 2018—including its pivotal demurral regarding ballot validation—and issued the Recognition Decision the very next day. Nor is there much more Plaintiffs could have done to uncover indication of the "Nooksack Draft Resolution/Proposal."

This evidence, particularly the Scherer-Porter Emails, was of such magnitude that production of it earlier would have been likely to change the disposition of the case. Those emails show that in making the Recognition Decision, DOI "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered

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an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. It now appears that DOI "relied on factors which Congress has not intended it to consider" when issuing the Recognition Decision: the potential civil RICO liability of the holdover Councilpersons in their personal capacities. Galanda Decl., Exs. A-D. Defendants acceded to political pressure from the holdover Council's lobbyist, which contaminated the administrative decision-making process. *Id.*

This is not permitted under the APA. *Id.* at 43; *see also, e.g., ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) ("The test is whether 'extraneous factors intruded into the calculus of consideration' of the individual decisionmaker.") (quoting *Peter Kiewit Sons' Co. v. United States Army Corps of Eng'rs*, 714 F.2d 163, 170 (D.C. Cir. 1983)); *Saget v. Trump*, 375 F. Supp. 3d 280, 360 (E.D.N.Y. 2019) (finding an agency "decision was arbitrary and capricious due to improper political influence"); *Connecticut v. U.S. Dep't of the Interior*, 363 F. Supp. 3d 45, 65 (D.D.C. 2019) (APA claim where "significant political pressure was brought to bear on the issue and the Secretary may have improperly succumbed to such pressure"); *Tummino v. Torti*, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009) ("An agency's consideration of some relevant factors does not immunize the decision; it would still be invalid if based in whole or in part on the pressures emanating from political actors.") (quotation omitted).

The Scherer-Porter Emails, alone, would have easily produced a different result. First, Defendants' summary judgment motion would have been denied or continued under Rule 56(d) had Plaintiffs been in rightful possession of this evidence via the AR or FOIA.

> Under Rule 56(d) of the Federal Rules of Civil Procedure, if the nonmoving party establishes that it is unable to properly defend against a motion for summary judgment, the Court may: (1) deny or continue the motion, (2) allow time to take discovery or obtain affidavits or declarations, or (3) issue any other appropriate

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> order. The party seeking such a continuance must make (a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists.

Spencer v. Peters, No. 11-5424, 2012 WL 4514417, at *15 (W.D. Wash. Oct. 2, 2012) (citation omitted). Again, in the Ninth Circuit, the AR must include any documents or materials directly or indirectly considered by agency decision-makers. *Thompson*, 885 F.2d at 555; *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir.1993) ("The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.").

Had Plaintiffs been aware of the Scherer-Porter Emails or the "Nooksack Draft Resolution/Proposal" and Defendants still not included that information in the AR, Plaintiffs would have responded to Defendants' summary judgment motion with a Rule 56(d) motion "mak[ing] clear what information is sought and how it would preclude summary judgment." *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir. 2001); *see also Petrolane, Inc. v. U.S., Dep't of Energy*, 79 F.R.D. 115, 119 n.12 (C.D. Cal. 1978) ("**the party seeking review and the Court have a right to a complete administrative record** and, when a showing is made that it may not be complete, limited discovery is appropriate to resolve that question.") (citation omitted; emphasis added); *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (describing situations where supplementation of the record through discovery is necessary); *see, e.g., Schaghticoke Tribal Nation v. Norton*, No. 06-81, 2006 WL 3231419, at *5 (D. Conn. Nov. 3, 2006) (granting limited discovery into whether "alleged pressure actually affected the agency decision on the merits"); *Skull Valley Band of Goshute Indians v. Cason*, No. 07-0526, 2009 WL 10689787, at *4 (D. Utah Mar. 2, 2009) (same).

In addition, as noted above, had Plaintiffs been in possession of the Scherer-Porter Emails, in particular, they would have sought to amend their Complaint pursuant to Rule 15(a) to allege

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two new APA claims, as outlined above. *See e.g. Jianhong Zhai v. Ning Liu*, No. 16-7242, 2017 WL 7156251, at *2 (C.D. Cal. Aug. 17, 2017) (instructing plaintiffs to "file a motion to set aside the default judgment pursuant to Rule 60(b) in conjunction with a motion to supplement the complaint pursuant to Rule 15(d)" in order to include new evidence in a pleading).

IV. CONCLUSION

This APA action is not about the "time-honored concept of tribal sovereignty and self-determination." Dkt. # 41 at 12. This APA action is about requiring the United States to fulfill its trust responsibility to the Nooksack Tribe and its electorate. That responsibility is one of "moral obligation of the highest responsibility and trust," which must "be judged by the most exacting fiduciary standards." *Seminole Nation v. U.S.*, 316 U.S. 286, 296-97 (1942). That responsibility includes "obligations to . . . which national honor has been committed." *Heckman v. U.S.*, 224 U.S. 443, 437 (1912). That responsibility extends to both Indian tribes and individual Indians and is guided by "a paramount commitment to protect their unique rights and ensure their well-being."[14] U.S. Secretary of the Interior, Order No. 3334 (Jun. 1, 2014), *available at* https://www.bie.edu/cs/groups/xbie/documents/document/idc1-031626.pdf.

At best for Defendants, the Scherer-Porter Emails reveal that PDAS Tahsuda did not issue the Recognition Decision in fulfillment of exacting federal Indian fiduciary standards. At worst, the Scherer-Porter Emails reveal that Defendants flouted the principled obligation and national honor that the United States owes to Plaintiffs and other Nooksack Indians—by aiding and abetting private racketeers' civil RICO defense. The withheld "Nooksack Draft Resolution/Proposal" information also clouds PDAS Tahsuda's decision.

[14] The Recognition Decision, as affirmed by this Court on August 13, 2019, is already being cited to immunize Nooksack bad actors from the repercussions of violating Nooksack members' *federal* civil rights. *Adams v. Dodge*, No. 2:19-cv-01263-JCC (W.D. Wash.), Dkt. # 28 at 5-6. PDAS's March 9, 2018, decision did not ensure Nooksack Indians' wellbeing—it ensured the continued law-and-order void at Nooksack and, thus, harm to Nooksack Indians.

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Plaintiffs and this Court must be allowed to discover who and what *actually* caused PDAS Tahsuda to issue the Recognition Decision. A proposed Order accompanies this Motion and sets forth a proposed schedule, upon any Ninth Circuit remand, for the filing of Plaintiffs' Second Amended Complaint; Defendants' second supplemental AR; and a Joint Status Report that addresses whether or not that supplementation renders the AR whole.

DATED this 29th day of January 2020.

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CERTIFICATE OF SERVICE

I, Wendy Foster, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF System, which will send electronic notification of such filing to the following parties:

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The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 29th day of January 2020.

s/Wendy Foster
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